

9 PERC ¶ 16123

UNIVERSITY OF CALIFORNIA (UCLA)

California Public Employment Relations Board

American Federation of State, County and Municipal Employees, AFL-CIO, Charging Party, v. The Regents of the University of California, Respondent.

Docket No. LA-CE-94-H

Order No. 504-H

April 23, 1985

Before Hesse, Chairperson; Jaeger and Morgenstern, Members

Interference -- Use Of Internal Communications -- Refusal To Permit Display Of Union Banner -- 72.120ALJ properly concluded that university, by refusing to permit union to use banner space near university's main gate, unlawfully interfered with union's right under HEERA section 3568 to access to means of communication available at university [see 8 PERC 15065 (1984)]. Although university's written policy reserved banner space for official university communications only, evidence showed that university in past permitted display of banners for nonofficial communications. Since it appeared that university's adherence to its own policy was arbitrary, such policy could not be viewed as "reasonable" [see *Marin Community College District*, 4 PERC 11198 (1980)]. University's claim that display of union banner at main gate would constitute unfair practice of unlawful support during election campaign was rejected as justification for its refusal to permit display of banner.

APPEARANCES

Reich, Adell and Crost by Glenn Rothner, Attorney for the American Federation of State, County and Municipal Employees, AFL-CIO; Edward M. Opton, Jr., Attorney for the Regents of the University of California.

DECISION

JAEGER, Member: The University of California (UC) excepts to the attached proposed decision [see 8 PERC 15065 (1984)] finding that it violated section 3571(a) and (b) and section 3568 of the Higher Education Employer-Employee Relations Act (HEERA or Act)1 by denying the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) access to banner space located on University property.

In its exceptions, the University argues that the administrative law judge (ALJ); overemphasized the exceptions to the official use of the banner space; mischaracterized AFSCME's efforts to communicate with the employees (implying by use of the word "attempted" that its efforts were unsuccessful); failed to recognize UC's implied "sponsorship" of AFSCME if it permitted AFSCME to use the banner because that space is known as official University space, and failed to recognize that the University is entitled to some method of communicating which clearly distinguishes its own communications from those of others. UC further argues that its Guidelines make a reasonable distinction between official and non-official communications, and that AFSCME had other means of communication available to it.

DISCUSSION

Although I ultimately agree that UC violated section 3571(a) and (b) of the Act, I do not

subscribe to the ALJ's apparent conclusion that an employer may deny access to its facilities only if such access would result in "disruption" of its mission. The cases relied upon by the ALJ in reaching this conclusion dealt primarily with general access to the employer's property and distinguished between those circumstances where access was likely to disrupt operations and those where access would have no such effect.

Here, the question is not simply one of general access to University grounds or facilities, but whether an employer is entitled to reserve to itself the exclusive use of a specific means of communication. It is, to me, beyond dispute that an employer has such a right. For example, an employer may have its own newsletters, bulletins, and bulletin boards, and need not place these means of communication at the disposal of employee organizations.² Here, the University claims the right to set up an exclusive means of communication, banners, for its own or official use.

The questions raised by the evidence, however, is whether the University did indeed limit the use of banner space to official purpose or whether, by discriminating against AFSCME, it unlawfully denied that organization its section 3568 rights. In some instances the pertinent evidence is ambiguous. In other instances, it simply runs against the tide of UC's legal claim.

It is contested that AFSCME was given permission to use the banner space until Greg Kramp, UC's labor relations manager, voiced his objections in a letter to the approving office. His specific reason was his view that AFSCME's use of the space would run against UC's no-representation campaign, although he also expressed concern over a possible unfair practice charge based on supposed support of one organization over another. It was only after this letter was received that UC decided that the Guidelines precluded AFSCME's use of the space.

The credibility of this explanation of UC's disclaimer of Kramp's letter as the basis for its decision to rescind the permit, suffers when other evidence is reviewed. Three other organizations used the banner space: Israel Act Committee (which no witness was able to define with certainty, but which was clearly not an "affiliated" organization); the Gay rights message; and a fraternity-sponsored bike-a-thon for ataxia.

The University refers to these instances as "aberrations," exceptions that prove the rule. But, the banners were displayed for an appreciable period of time, at least in one instance for as long as two weeks, over a prominent entrance to the campus, yet there is no evidence that the University ordered them removed.

The Board has held that a regulation or policy which permits some outside individuals or organizations access to the employer's facilities but denies such access to employee organizations is not reasonable within the meaning of the Act and therefore violates the organization's statutory right of access.³ In light of the virtually identical language of section 3568, I find it appropriate to apply the *Marin* rule here.

In summary, I conclude that the University, by denying AFSCME the use of the Westwood-LeConte banner space but granting such use to others for non-official communications, unreasonably denied AFSCME its right of access granted by section 3568, and also denied University employees the exercise of rights granted them by the Act.

Because the ALJ properly disposed of the other matters to which the University takes exception, I find no need to address them here.

ORDER

Based upon the entire record in the matter, and pursuant to Government Code section 3563.3, it is hereby ORDERED that the University of California and its representatives shall:

A. CEASE AND DESIST FROM:

1. Discriminating against the American Federation of State, County and Municipal Employees by failing or refusing to grant the organization reasonable access to banner space located at the intersection of LeConte Avenue and Westwood Boulevard at UCLA; and

2. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by HEERA by failing or refusing to permit AFSCME to use the above-cited banner space.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

1. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, prepare and post copies of the Notice to Employees attached as an Appendix hereto, for at least thirty (30) consecutive workdays in conspicuous places at those locations where notices to employees are customarily posted. The Notice must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

2. Written notification of the actions taken to comply with this Order shall be made to the San Francisco regional director of the Public Employment Relations Board in accordance with her instructions.

¹ HEERA is codified at Government Code 3560 et. seq.

² The employer's right to such means of communication is separate and distinct from those access rights granted employee organizations by section 3568.

³ *Marin Community College District* (11/19/80) PERB Decision No. 145, interpreting section 3543.1 of the Educational Employment Relations Act. See also *Wm. H. Black* (1964) 150 NLRB 341 [57 LRRM 1531].

Morgenstern, Member, concurring: While I concur with Member Jaeger's majority opinion, I take exception to some of his logic. I fully agree that, where adequate means of communication and access otherwise exist, the employer may refuse certain specific means of communication to employee organizations.¹ Member Jaeger says the question is "whether an employer is entitled to reserve to itself the exclusive use of a specific means of communication" and finds this to be beyond dispute. I find that limiting the employer's use of the specific means in question to its own exclusive use, if meant in a literal sense, is overly restrictive on the employer. It is not difficult to envision circumstances in which an employer's rules might properly and reasonably allow the use of a particular mode of communication for some causes or organizations but not others, even though employee organizations fall in the latter category. The employer and its employees' organizations have a business, sometimes adversarial business, relationship. Section 3568 does not require that the employer avail all "other means of communication" to its business relation or adversary just because these means exist, or just because some groups use them. The law simply mandates reasonable rules.² The statutory requirement for reasonable rules is met where restrictions are based on a good business purpose, are fairly and logically constructed and applied, and adequate access results.

Member Jaeger cites evidence to indicate that the University did not in fact reserve to itself exclusive use of this banner space. The same evidence also demonstrates that the University did not apply reasonable rules. The University alleged that the space was only to be used for "affiliated organizations" but blatantly proceeded to thrice ignore its own dictate. A rule arbitrarily applied is not a reasonable rule. Thus, while the law allows the University leeway to restrict employee organization access, it requires those restrictions be pursuant to reasonable rules. As they were not, the University erred.

However, I do feel it necessary to specifically reject the ALJ's statement that the University wanted to decide when AFSCME had communicated sufficiently with the employees. No such evidence exists. Rather, as Chairperson Hess's dissent correctly points out, the University was primarily interested in not contradicting its own vigorous "no representation" campaign.³ While the Board might well find such a goal to be quite reasonable, here, it was not properly pursued

and implemented.

1 The employer may not, however, refuse *all* access to bulletin boards and mailboxes, use of which is expressly mandated by statute, or to internal mail systems, which we have found to be required as a traditional and essential means of communication. *Richmond Unified School District/Simi Valley Unified School District* (1979) PERB Decision No. 99.

2 Section 3568 provides:

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

3 I do not find at all credible the University's other argument, that it was protecting itself against a possible unfair practice charge by a competing union.

Hesse, Chairperson, dissenting: As noted by the author of the majority opinion, an employer can restrict a union's use of facilities and limit its access as long as those regulations are reasonable and non-discriminatory. As I interpret the facts of this case, UC's restriction on the banner space was not unreasonable because of two legitimate business reasons.

First, UC logically feared that AFSCME's use of the banner space could have drawn an unfair practice charge from a competing union on the grounds that UC favored AFSCME. Because the banner space was unique, equal access to all unions was not possible. Even allotting various unions use of the space on a rotation basis would not result in equal access because use of the space the week or two just prior to the representation election is far more valuable than during a week some months earlier. That AFSCME offered to provide "releases" from other unions is immaterial. Neither PERB nor UC should be required to examine the fairness or validity of releases in this situation. Therefore, UC's wish not to favor one union over another was a legitimate concern and its response of restricting AFSCME's use of the space was reasonable.

The second, though less important reason why UC's restriction was not unreasonable is its desire not to contradict its own vigorous "no representation" campaign. The placement of the banner was on UC property and, presumably, required UC cooperation in the mere physical act of placing the banner. Thus, an ambiguity arises: UC wants "no representation" but will help a union communicate the *opposite* message to its employees. Surely, UC has the right to avoid giving such mixed signals to its employees. Nor am I persuaded by the testimony or the ALJ's findings that UC's campaign was so well-known that no one could possibly misunderstand UC's position and confuse UC's permission to fly the banner with an endorsement of AFSCME. We can have no way of knowing what the average employee thought, and I do not believe that AFSCME met the burden of proof of showing that there could be no confusion.

For the above reasons, I would hold that UC's restriction was reasonable in this instance.
